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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 176

EUSTACE HARDING,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND SUPPORTING BRIEF.

ALEX W. PARKER,
EDWARD P. SIMPKINS, JR.,
A. C. EPPS,
Attorneys for Petitioner,
Mutual Building,
Richmond, Virginia.

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SUPREME COURT OF THE UNITED STATES

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EUSTACE HARDING,

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THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Eustace Harding, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, rendered on June 3, 1950, affirming a judgment of the United States District Court for the Eastern District of Virginia, Richmond, Virginia, of January 11, 1950, adjudging petitioner guilty as charged in a four count indictment, sentencing petitioner to imprisonment for a period of one year and one day, and imposing a fine of Seven hundred dollars ($700.00).

Opinions Below

The *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit (hereinafter called the Court

of Appeals) and the dissenting opinion thereto appear at page 34 of the record. The opinion of the United States District Court for the Eastern District of Virginia, Richmond Division (hereinafter called the District Court), is in the form of the Judge's remarks made at the close of the argument upon the motion for acquittal or in the alternative for a new trial and appears at page 24 of the record.

Jurisdiction

Jurisdiction is invoked under Section 1254 (1) of the Judicial Code, 28 U. S. C. A. Sec. 1254 (1).

Question Presented

The sole question in the case is the sufficiency of the evidence to sustain a conviction of the petitioner of violations of Sections 2810, 2833, 2834, and 3321 of Title 26 of the U. S. C. A., as set out in the four counts of the indictment. A copy of the indictment appears at page 1 of the record.

Summary and Short Statement

The petitioner, Eustace Harding, was convicted in the District Court on all counts of an indictment containing four counts, in which counts he was charged respectively with having "in (his) custody and under (his) control a certain distilling apparatus set up which had not been registered" contrary to 26 U. S. C. A., Sec. 2810; with carrying on "the business of a distiller without having given bond as required by law" contrary to 26 U. S. C. A., Sec. 2833; with making and causing "to be fermented a certain quantity of mash, to-wit, 150 gallons fit for distillation and production of spirits" contrary to 26 U. S. C. A., Sec. 2834; and with concealing, and aiding and abetting "in the concealing of certain goods and commodities for and in respect whereof a cer-

tain tax is imposed, to-wit, 1½ gallons of distilled spirits" contrary to 26 U. S. C. A., Sec. 3321. The petitioner was tried, together with two co-defendants, by the District Court without a jury. At the conclusion of the government's evidence, a motion for acquittal was made on behalf of the petitioner (Record, page 19). The motion, being overruled, was renewed at the close of all the evidence (Record, page 23), at which time it was again overruled. A motion for acquittal under Rule 29-B, or in the alternative for a new trial pursuant to Rule 33 of the Rules of Criminal Procedure, was subsequently filed (Record, page 3) and overruled and the petitioner was sentenced to one year and one day in prison and was fined Seven hundred dollars ($700.00) (Record, page 25).

At the trial in the District Court, two investigators of the Alcohol Tax Unit of the Treasury Department of the United States of America, Mr. Samuel C. Burgess and Mr. John H. Lemon, and one investigator of the Alcoholic Beverage Control Board of the Commonwealth of Virginia, Mr. M. K. Bryant, testified on behalf of the government. The investigators testified that on June 3, 1948, they located a still site in Stafford County, Virginia. At that time three barrels of mash were at the still site but no still was found (Record, page 71) and no persons were seen at the still site. On June 9, 1948, at 11:00 o'clock, a.m., two investigators returned. At that time they found four barrels of mash and a still partially set up but not in operation (Record, page 7). Again no one was found at the still. The still was observed by the two investigators from 11:00 o'clock in the morning until 3:40 in the afternoon, and during this time no one was seen to approach the still (Record, page 8). The two investigators then left the scene and returned with the third investigator at 6:35. At that time Mr. Lemon and Mr. Bryant remained on one side of the still site and the third investigator, Mr. Burgess, started to work his way around

the still site through the thick woods (Record, page 8). As Mr. Burgess worked his way around through the woods, he stated that he saw two men at the still (neither being petitioner) and, continuing to circle the still site, he stated that he saw the petitioner, Eustace Harding, walking through the woods in the direction of the still (Record, page 9). The investigators then rushed in, and all three of the men ran. One of them, named Grinnan, was caught by the investigators. Mr. Lemon, the other Alcohol Tax Unit investigator, saw no one at the still, but saw one man, not the petitioner but Floyd Alvin Grinnan, running from the vicinity of the still (Record, page 15). Mr. Bryant, the investigator of the Alcoholic Beverage Control Board, saw the still in operation but did not see the petitioner at the still (Record, pages 16-18).

The evidence showed that petitioner was never at the still but was walking in the woods in the vicinity thereof.

The still was not on the petitioner's land (Record, page 11); it was approximately three-quarters of a mile from the petitioner's home (Record, page 7). It was necessary to cross at least one road to get to the site of the still from the petitioner's home (Record, pages 11, 15). There were at least two homes, and probably a third, occupied by other people, closer to the still site than the home of Eustace Harding. One of these was approximately four hundred yards therefrom (Record, pages 11-13). There was no path leading from Eustace Harding's home to the still site (Record, page 13). There were also sawmill roads in the general vicinity of the still site (Record, page 15).

The evidence for the petitioner showed conclusively that on the 9th day of June, 1948, the petitioner worked for his regular employer from 7:30 a.m. until 5:00 p.m. at a point six or seven miles from his home and from the still site and that he was in the company of his employer from the time of leaving work at approximately 5:00 o'clock until

he was left at his home between 6:00 and 6:30 (Record, pages 20-23).

The petitioner did not take the stand in his own behalf.

Reasons Relied On for the Allowance of the Writ

The decision of the Court of Appeals for the Fourth Circuit in the case at bar is directly and completely contrary to the decision of the Supreme Court of the United States in the case of *Bozza* v. *U. S.*, 330 U. S. 160 (1947), which held that proof of presence at a distillery is insufficient to convict upon similar counts of an indictment. Prior to the *Bozza* case, *supra*, there was a conflict among the circuits upon the point, and the Court of Appeals herein has rendered a decision in conflict with the decisions of Courts of Appeals for other circuits on the same matter.

Conclusion

Wherefore, for the reasons stated in the petition and in the annexed brief, it is respectfully submitted that the writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit herein prayed for should be granted.

Respectfully submitted,

ALEX W. PARKER,
Mutual Building,
Richmond, Virginia.

EDWARD P. SIMPKINS, JR.,
Mutual Building,
Richmond, Virginia.

A. C. EPPS,
Mutual Building,
Richmond, Virginia.

Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 176

EUSTACE HARDING,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Court of Appeals in this case has decided by its refusal to reverse the decision of the District Court that presence in the woods in the vicinity of a distillery and flight when officers of the law made their appearance are sufficient to convict the petitioner of a violation of any one or all of the counts of the indictment. Considered in connection with the well-known principles that an accused is presumed to be innocent until his guilt is proved beyond a reasonable doubt and that in order to sustain a conviction

upon circumstantial evidence the circumstances proved must be consistent with the hypothesis that the accused is guilty and inconsistent with every reasonable hypothesis that he is innocent, it is submitted that the evidence falls far short of proving the guilt of the petitioner on any of the counts of the indictment.

A summary of the evidence in the case has been set forth in the petition for the writ of certiorari.

There is no evidence of the existence of the distillery until 11:00 a. m. on the morning of June 9, 1948. The evidence shows conclusively that the petitioner was a great distance from the site of the still all day on the 9th of June and was left at his home at 6:00 or 6:30 p. m. on that day. The distillery was not on the land of the petitioner. He was never present at the still. No path led from his home to the still. There were other persons living in the vicinity much closer to the still than the petitioner. The only evidence which connects him in any way with the still is the fact that he is said to have been seen walking through the woods near the still at approximately 6:35 p. m. It is obvious that he could not have participated in the work that had been done at the distillery between 3:40 p. m., when the investigators ceased to observe it, and 6:35 p. m. when they returned. Investigator Burgess stated that someone had been there long enough "to build a fire, set up the still, fill the coil barrel full of water and make a gallon and a half of whisky, and someone had got up a big pile of wood and got in another barrel and put sugar in it and water." An analysis of this testimony shows that the only bit of evidence that the government has produced to prove that Eustace Harding had custody and control of the still, carried on the business of a distiller, made or caused to be made mash, or concealed distilled spirits, is the fact that he was seen walking through the woods. Of

course the government agents testified that Harding ran when the cry went up. It is the contention of the petitioner that the mere statement of the facts shows that the evidence is insufficient to prove beyond a reasonable doubt that the petitioner is guilty.

The holding of the Court of Appeals that the evidence was sufficient to convict the petitioner on any one of the counts is contrary to the decision of the Supreme Court of the United States in *Bozza* v. *U. S.*, 330 U. S. 160 (1947) and is also contrary to the decisions of Courts of Appeals of other circuits.

The Bozza Case

In the *Bozza case,* Bozza and one Chirichillo were tried and convicted under an indictment containing five counts. The first count charged that Bozza carried on the business of a distiller in violation of 26 U. S. C. A., Sec. 2833a. (See Second Count, Harding indictment.) The second count charged possession and custody of a distilling apparatus in violation of 26 U. S. C. A., Sec. 2810a. (See First count, Harding indictment.) The third count charged that Bozza made and fermented mash in violation of 26 U. S. C. A., Sec. 2834. (See Third count, Harding indictment.) The fourth count charged unlawful concealment of distilled spirits in violation of 26 U. S. C. A., Sec. 3321. (See Fourth count, Harding indictment.) The fifth count charged unlawful transportation of distilled spirits in violation of 26 U. S. C. A., sec. 2803.

Apparently neither Bozza nor Chirichillo testified. The government's evidence was that Chirichillo was the moving party throughout the enterprise, but Bozza helped out Chirichillo in the making of the alcohol inside a farm house. Bozza was said not to be there every day in the week but that he would just come around between two and three times a week to help out around the still and take instructions from

Chirichillo. The government further showed that Bozza drove the lead car when Chirichillo transported the alcohol from the farm house to Newark, New Jersey. The jury convicted Bozza on all counts and an appeal was had to the Court of Appeals for the Third Circuit. *U. S.* v. *Bozza,* 155 F. 2d 592 (C. A. 3, 1946). Although Bozza did not explain any suspicious circumstances and did not testify, the Court of Appeals for the Third Circuit held that there was insufficient evidence to convict Bozza on charges four and five, namely of unlawful concealment of distilled spirits and of unlawful transportation.

Bozza appealed his conviction on the first three counts to the Supreme Court of the United States. The Supreme Court reversed the conviction on counts two and three and the government's attorneys concurred that they had no case upon either possession and custody or unlawfully making and fermenting mash. The Supreme Court said that there was sufficient evidence, since the man actually did work at the distillery, that he was engaged in unlawfully carrying on the business of a distiller.

It is the contention of the petitioner that the holding of the Court of Appeals in the case at bar is in direct conflict with the holding of the *Bozza case.* While it is true that the conviction of Bozza on the count of carrying on the business of a distillery was upheld, there was in the *Bozza case* positive, direct, and uncontradicted testimony that Bozza worked in the operation of the still (which has never been shown in the case at bar), but in spite of this direct and uncontroverted connection of Bozza with the distilling apparatus and his presence at the distilling apparatus, his presence at a place where mash was being unlawfully made and fermented, and his presence at a place where distilled spirits were being unlawfully distilled, the Supreme Court held that this presence, without more, was insufficient to

convict him on the other counts of the indictment. It is obvious that, had there not been the positive, direct and uncontroverted testimony as to Bozza's working at the distillery, the Supreme Court would not have upheld the conviction under the first count upon presence alone. It is therefore obvious that the Supreme Court of the United States has in the *Bozza case* held that mere presence is not sufficient to convict the petitioner under any one of the counts of the indictment in the instant case.

The meaning of the *Bozza* case was clearly understood by the dissenting judge of the Court of Appeals in the case at bar as indicated by the statement in the dissenting opinion as follows:

> "Moreover, the conclusion that Harding is guilty on all or any of the counts is completely contrary to *Bozza v. U. S.*, 330 U. S. 160."

It is the law of the land as laid down in the *Bozza* case that, as the Court stated at 330 U. S. 163:

> "The Internal Revenue Statutes have broken down the various steps and phases of a continuous illicit distilling business and made each of them a separate offense. Thus, these statutes have clearly carved out the conduct of making mash as a separate offense, thereby distinguishing it from the other offenses involving other steps and phases of the distilling business. Consequently, testimony to prove this separate offense of making mash must point directly to conduct within the narrow margins which the statute alone defines. One who neither engages in the conduct specifically prohibited, nor aids and abets it, does not violate the section which prohibits it."

In other words, the four counts of the indictment in the instant case charge separate offenses prohibited by separate sections of the Internal Revenue statutes and in order to convict under any one of them, the government must intro-

duce evidence which points directly "to conduct within the narrow margins which the statute alone defines".

This the Court of Appeals completely ignored as is shown by the following excerpt from its opinion:

> "Presence so near the illicit operation and flight when officers of the law made their appearance lead reasonably to the conclusion that those who were present and fled must have had some *guilty connection with* what was going on." (Emphasis added.)

The Court in its opinion did not mention the separate counts of the indictment but merely concluded as above stated.

The point made by the Court of Appeals as to the flight of the petitioner is not evidence of guilt under any one of the four counts in the indictment. Further, it is perfectly reasonable to assume that petitioner, in the woods, upon being startled by the outcry of a raid upon a still would in all innocence flee. There are many reasons for flight consistent with the hypothesis of innocence. We suggest, among others, that a person on his way to get a drink would run; or that a person innocently walking in the woods and suddenly finding himself in the vicinity of a still which was being raided would run.

Decisions of Other Circuits

There are a number of cases from other circuits in which the evidence of guilt has been much stronger than the instant case in which the District Court has been reversed because of insufficient evidence. These cases involve the presence of the accused either near or at an illicit distillery. It is the contention of counsel for petitioner that they are in direct conflict with the decision of the United States Court of Appeals for the Fourth Circuit in the instant case.

In the case of *Cantrell* v. *U. S.*, 158 F. 2d 517 (C. A. 5, 1946), Cantrell was convicted on four counts of a five-count indictment. Counts one and two charged Cantrell and others with possession of an unregistered distillery and a quantity of liquor on which tax had not been paid. The evidence showed that the officers raided the still in Pope County, Georgia, and apprehended one person at the still. Cantrell was not seen at the still but was met by one of the officers walking along a path to the still. He gave a false name and stated falsely that he did not own the automobile which was later found parked in the vicinity. There was no other evidence tending to connect Cantrell with the still or possession of the whisky found there. Although at the trial Cantrell stated that he went into the woods looking for some friends who he thought were hunting there, he gave no explanation as to why he originally gave a false name to the officers and told an untruth about his automobile. The Court, in reversing the conviction on the first two counts of the indictment and holding that the evidence was not sufficient to support the verdict, stated, at page 517:

> "The presence of Cantrell in the vicinity of the still and along the pathway leading to the public road, was not enough, standing alone, to support a verdict of guilty on the first two counts of the indictment. 'The rule in such cases * * * is that the inferences that may be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence.' Strickland v. United States, 5 Cir., 155 F. 2d 167, 168; Kassen v. United States, 5 Cir., 87 F. 2d 183."

In the case of *Reavis* v. *U. S.*, 93 F. 2d 307 (C. A. 10, 1937), the appellant, Reavis, was convicted upon an indictment charging four counts substantially similar to the four counts in the instant case. There was evidence that the still was in close proximity to Reavis' farm, that while the officers were

at the still Reavis rode up to the still on horseback, that the sheriff recognized his voice before he saw him and identified him when a flashlight was shone upon him, that a co-defendant who was operating the still recognized him and the horse and so stated at the time and that after the beam of the flashlight was placed on him he rode away. In reversing the conviction on all counts, the Court said, at page 309:

> "We cannot agree that the proximity of the still to Reavis' farm or the statement attributed to Carroll by the federal agent had any tendency whatever to prove that appellant was a party to the commission of any of the four offenses charged against him. Nor for the purpose can we attribute any weight to the fact, if it be a fact, that he rode up to the still on the occasion stated."

It should be noted that Reavis offered no explanation of his presence in the vicinity of the still but denied that he had been there. The jury, however, convicted Reavis, thus establishing his presence in the vicinity of the still and the fact that he had told an untruth about it.

Another case involving the conviction of a person found going toward a still is the case of *Girgenti and Marconi* v. *U. S.*, 81 F. 2d 741 (C. A. 3, 1936). In this case the accused were convicted of possession of an unregistered still under a count similar to count one in the instant case, and of making and fermenting mash under counts similar to count three in the instant case. The testimony was to the effect that Girgenti and Marconi were arrested when they drove into the farm where the still was found and at the time had in their possession a revolver, a hydrometer, certain old clothes and some sandwiches. The hydrometer was of the type used in testing alcoholic content of a liquid. The possession of this instrument was unexplained and the presence of the appellants on the farm was explained merely by the statement that they were lost. The Court, in reversing the

convictions because of insufficiency of evidence, stated, at page 742:

> "The presence of the appellants at or near the premises where the still was in operation is not sufficient to sustain a conviction on counts charging them with possession of an unregistered still or the manufacture of mash, in the absence of any testimony that they were in charge of, or were doing work in connection with, the still. The possession of old clothes, sandwiches, and a revolver is as consistent with innocence of the offenses charged as with guilt. Graceffo v. United States (C. C. A.) 46 F. (2d) 852, and cases there cited. The unexplained possession of the hydrometer supports an inference that the appellants were concerned with testing liquor in some form, but was not in itself sufficient evidence to warrant the conclusion that they were connected with the operation of the still in question. To mention but a few of the possibilities, the appellants might have been purchasers of liquor, or sold liquor, or even had some connection with a still other than the one described in the indictment. The evidence produced fails to sustain the charges in the indictments. We think the learned trial court erred in refusing to direct verdicts for the appellants."

In *Parente* v. *U. S.*, 82 F. 2d 722 (C. A. 8, 1936), Parente was convicted on three counts which are substantially the same as the first three counts of the indictment in the instant case. The evidence was that government officers surrounded a house and one of them approached the door. The door was then closed and he heard the lock click. He knocked on the door, stated that he was a government officer with a search warrant and demanded admission. Admission was refused, and after again announcing his identity he broke in the door. All three officers entered the house and found therein Parente and three other men and in the basement of the house a three-hundred-gallon still in operation. The appellate court overruled the conviction of Parente. As to

the other three, there was evidence of connection with the operation and control of the still in addition to the suspicious circumstances of being in the house where the still was located. In spite of the fact that Parente was in the house, in the basement of which the still was in full operation, and in spite of the further suspicious circumstances of the locking and bolting of the door and the failure to open the same upon demand, the Court said, at page 725:

> "The evidence tending to connect Parente with the offenses charged is so weak that, in our judgment, it did not justify submitting the question of his guilt to the jury. Whether he had any actual part in these illegal activities would, under the evidence be a matter of speculation and conjecture."

In the case of *U. S.* v. *DeVito, et al.*, 68 F. 2d 837 (C. A. 2, 1934), DeVito and three other defendants were convicted of the unlawful possession of an unregistered still and appealed, contending that the evidence was insufficient. The government showed that upon the raid of a building the still was found in operation in the plain sight and presence of the accused, but no one was seen working about the still. They gave false addresses and refused to answer any questions. Upon the trial of the case each gave his explanation of why he was there but none admitted operating the still. The government was unable to show which of the men were telling the truth and which were not. In reversing a conviction upon a count charging possession of a still, the Court said, at page 839:

> "Their presence there with the still in operation was a suspicious circumstance. So was the fact that the addresses they gave did not prove to be correct when investigated. If suspicious circumstances were enough, the evidence would be sufficient to support the conviction. But that is not enough, of course, Graceffo v. United States (C. C. A.) 46 F. (2d) 852. Granted that

the statute, section 3258 Rev. St. (26 USCA Sec. 281), does not make it necessary to show possession, but that custody or control is enough, and that it would be unreasonable to believe that the still would have been in operation with no one having it in custody or control; the evidence is woefully weak in any showing that these appellants or any of them had the custody or control of it. They might have. Any one of them might have. Davis might have; and so might one or more now unknown. They were unfortunate enough to be inside at the moment the officers entered. Had they been working there and had the custody and control of the still, the appearance of their clothing might, perhaps, have given some indication of it. But the officers could remember only how DeVito was dressed, and his clothing was not the kind a workman at a still would be expected to wear. There was no evidence that the clothing of any of the others indicated that its wearer was working there. Nor that the operation of the still required the services of so many. The burden, of course, was on the government to prove beyond a reasonable doubt that these defendants were guilty as charged in the second count. The proof that all were guilty rises only to the level of suspicion, and, as there is nothing to distinguish one from another in this respect, the guilt of none was proved."

In the case of *Loehr et al.* v. *U. S.*, 54 F. 2d 859 (C. A. 10, 1931), one Warner was convicted on four counts charging respectively manufacture of whisky, possession of equipment designed for manufacture of whisky, possession of whisky and maintaining a nuisance. An examination of the evidence in this case will reveal that it was much stronger than the evidence which the government has produced against Harding, the petitioner. In the *Loehr* case, the enforcement officers testified that they found a still in operation in a building on a farm owned by John Loehr. No one was found on the premises at the time except the defendant, Warner. The officers stated that Warner had run away

from the barn in which the still was in operation; his hat and coat were found in the building; there was a cot there on which he had lain. Warner testified that he knew the still was in operation and did not run away but simply got up from where he had been sleeping when he heard a car drive up and that he had nothing to do with the making of the whisky but was employed to plow corn. The Court, in reversing the conviction of Warner because of the insufficiency of the evidence against him, stated, at page 860:

> "The accusations are that this defendant manufactured whisky, was in the possession of materials designed for the purpose of manufacturing whisky, with the possession of whisky, and the maintenance of a common nuisance. These are the charges against him. The property where the still was located was not his property. He is not shown to have done any act at the still. All that is shown to have been done by him is just as consonant with his innocence as his guilt. The fact that he knew John Loehr had a still on his property, made and sold whisky, would not prevent him from being employed on the premises for an altogether different work or purpose. Again, are the suspicions aroused against him enough on which to convict of a felony beyond a reasonable doubt? The presumption of his innocence weighs more in the face of the known or proven facts in this case than the conjectures and the suspicions shown. The evidence of guilt is entirely lacking. He may have been guilty; he may not be. It is not within the province of a jury to return a verdict of guilty unless the evidence shows guilt beyond a reasonable doubt."

Conclusion

It will thus be seen that the evidence in the instant case would have been insufficient to convict petitioner in any of the following tribunals:

The Supreme Court of the United States.

The United States Court of Appeals for the Second Circuit.

The United States Court of Appeals for the Third Circuit.

The United States Court of Appeals for the Fifth Circuit.

The United States Court of Appeals for the Eighth Circuit.

The United States Court of Appeals for the Tenth Circuit.

Nevertheless the United States Court of Appeals for the Fourth Circuit saw fit to sustain the conviction.

We therefore submit that the writ should be granted.

Respectfully submitted,

ALEXANDER W. PARKER,
EDWARD P. SIMPKINS, JR.,
A. C. EPPS,
Counsel for Petitioner.

Mutual Building,
Richmond, Virginia.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 176

EUSTACE HARDING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 34-37) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 3, 1950 (R. 37-38). The petition for a writ of certiorari was filed July 3, 1950. The jurisdiction of this Court is invoked under 28

U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether the evidence is sufficient to support petitioner's conviction of illegally carrying on the business of a distiller.

STATUTE INVOLVED

Section 2833(a) of the Internal Revenue Code (26 U.S.C. 2833(a)) provides in pertinent part:

> Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *

STATEMENT

Count 2 of a 4-count indictment (R. 1-3) filed in the District Court for the Eastern District of Virginia charged petitioner and two co-defendants —Floyd Alvin Grinnan and Chester Brown—with carrying on the business of a distiller without having given bond as required by law, in violation of Section 2833(a) of the Internal Revenue Code, *supra*. Counts 1, 3, and 4 charged the same defendants with having in their custody an unregistered still, making mash fit for distillation on un-

authorized premises, and concealing distilled spirits with intent to defraud the United States of taxes, in violation of Sections 2810(a), 2834, and 3321(a) (26 U.S.C. 2810(a) 2834, 3321(a)), respectively. Following a trial before the court, a jury having been waived (Tr. 84),[1] all three defendants were found guilty (R. 34). Petitioner was sentenced generally to imprisonment for one year and one day and to pay a fine of $700 (R. 5). On appeal by petitioner alone to the Court of Appeals for the Fourth Circuit, the judgment of conviction was affirmed (R. 37-38), one judge dissenting (R. 35-37).

The evidence adduced by the Government in support of petitioner's conviction on count 2, *supra,* may be summarized as follows:[2]

On June 3, 1948, Samuel Burgess, an investigator attached to the Alcohol Tax Unit, Bureau of Internal Revenue, and another investigator, acting on certain information received by them, began to search in the neighborhood of petitioner's house for evidence of a still. Finding an old path

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[1] "Tr." refers herein to the original typewritten transcript of record on file in this Court.

[2] Since petitioner's general sentence of one year and a day in prison and a $700 fine is within the maximum allowable punishment fixed by Section 2833(a) of the Internal Revenue Code, *supra,* p. 2, on which the second count of the indictment was predicated, it is unnecessary to consider whether the evidence is sufficient to support the convictions on the remaining counts. *Pinkerton* v. *United States,* 328 U.S. 640, 641-642, fn. 1, and cases cited.

which showed some evidence of recent travel, they followed the signs of travel until they led to a still site in the open woods approximately three-quarters of a mile from petitioner's house. There were three barrels of mash at the site, but no still was set up, and no one was in the vicinity. (R. 6-7, 10-13; Tr. 13, 22-23, 36.)

On June 9, 1948, the investigators returned to the still site, and found that a still had been partially installed in the meantime. They waited in the woods nearby from 11 a.m to 3:40 p.m. but saw no one at or near the still during that time. (R. 7-8, 16, 31; Tr. 15-16, 26.) Returning at about 6:30 p.m., they found the still in operation, with one and one-half gallons of whiskey already made. Petitioner's codefendants, Brown and Grinnan, were at the still, and petitioner was about ten yards away, approaching the still along the path from his home. All three were wearing work clothes. There is no suggestion that Brown or Grinnan showed surprise at petitioner's approach. On seeing the investigators, all three men ran off. Grinnan was caught, but petitioner and Brown escaped. (R. 8-10, 13-15, 16-18, 29; Tr. 40-48.) Burgess, who had recognized Brown and petitioner, then went to each of their homes and advised their wives that they had been recognized at the still and that they should give themselves up. A month or two later, petitioner surrendered to the investigators. (R. 13-14, 29-30, 31.)

According to witnesses for the defense, petitioner, an employee in his cousin's saw mill, located some six miles from his home, had worked at the mill from 7 a.m. to 4:30 p.m. on June 9, 1948, the date of the alleged offenses; he left the mill at 5 p.m. and arrived at his home at about 6:00 or 6:30 p.m. (R. 20-23; Tr. 51-58). Petitioner himself did not testify, and he adduced no evidence tending to explain his presence near the still, his flight, or the signs of travel between his home and the still.

ARGUMENT

Petitioner's sole contention is that the evidence is insufficient to sustain his conviction. We submit that the majority below were correct in holding that the evidence is sufficient to support his conviction on count 2, charging the illicit carrying on the business of a distiller.[3]

Petitioner's presence in the close vicinity of an operating still, the evidence of recent travel between his house and the still, and the circumstance of his instantaneous flight upon the appearance of the investigators, all justified an inference of guilt. Petitioner offered no explanation of any of these circumstances.[4] The flight of the accused always has "a tendency to establish his guilt" (*Allen* v.

[3] For the reasons stated in note 2, *supra*, p. 3, his general sentence on all four counts must be sustained if the evidence is adequate to sustain his conviction on the second count.

[4] His present suggestion that he was merely out for a stroll (Pet. 8, 12) is hardly plausible in view of the testimony that he had just returned from nine hours of hard outdoor labor as a logger.

United States, 164 U.S. 492, 499; *Bird* v. *United States,* 187 U.S. 118, 131) and in the situation here presented that tendency was a strong one. As the majority below observed (R. 35), "presence so near the illicit operation and flight when officers of the law made their appearance lead reasonably to the conclusion that those who were present and fled must have had some guilty connection with what was going on. We cannot say that the judge was not justified in taking the view which other reasonable men would take of the circumstances." Whether petitioner's guilt was that of a principal in the illegal operation, or merely that of an aider and abettor of the others, was, of course, irrelevant. See 18 U.S.C. [1946 ed.] 550; *Bozza v. United States,* 330 U.S. 160, 164.

The decision below is not in conflict with the *Bozza* decision, as petitioner contends (Pet. 5, 9-11). Bozza's conviction under Section 2833(a) of the Internal Revenue Code—the same section as that on which count 2 of the instant indictment was predicated—was upheld by this Court. And this Court's acceptance of the Government's concession that, on the particular facts there present, his conviction should be reversed on two other counts rested on the recognition that the charges laid in those counts were more narrowly drawn and required a more specific character of proof than that necessary for the more general offense of carrying on the business of a distiller. Nor is there

conflict with the Court of Appeals decisions cited by petitioner.[5] Since both courts below have upheld the sufficiency of the evidence we submit there is no occasion for further review. See *Kann* v. *United States,* 323 U.S. 88, 93; *United States* v. *Johnson,* 319 U.S. 503, 518; *Delaney* v. *United States,* 263 U.S. 586, 589-590.

CONCLUSION

The judgment below is correct, and no conflict of decisions or question of importance is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
FELICIA H. DUBROVSKY,
Attorneys.

AUGUST 1950.

[5] Only one of the cases cited, *Parente* v. *United States,* 82 F. 2d 722 (C.A. 8), involved the charge of carrying on the business of a distiller. In the *Parente* case, the only evidence to sustain conviction was the petitioner's presence in the first floor of a building in which liquor was being made in the basement. There was no flight, and no proof that he observed the operations going on in the basement. Similarly none of the other cases cited involved presence in full sight of an operating still and instantaneous flight upon appearance of the investigators.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 902404 97

FILED
SEP 15 1950

Supreme Court of the United States

October Term, 1950

No. 176

EUSTACE HARDING, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF ON BEHALF OF PETITIONER

ALEX W. PARKER
EDWARD P. SIMPKINS, JR.
A. C. EPPS
Mutual Building
Richmond, Virginia
Attorneys for Petitioner

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REPLY BRIEF ON BEHALF OF PETITIONER

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The brief for respondent, by limiting its argument to the sufficiency of the evidence on count two of the indictment and by stating on page 2 of its brief that the only question presented is the sufficiency of the evidence to convict petitioner of illegally carrying on the business of a distiller in effect admits the insufficiency of the evidence to convict on counts one, three, and four of the indictment. Therefore the argument of this reply brief will be limited to count two of the indictment and the facts and law pertaining thereto.

Facts

Brief for respondent draws certain erroneous or unwarranted conclusions from the evidence as disclosed by the record.

1. Brief for respondent concludes that there was a path from the home of petitioner to the still.

There is no evidence in the record that a path led from the home of the petitioner to the still or the still site. A reading of the testimony on this point (particularly R. 7) shows that the investigators found no path leading from Harding's home, that they did find an old path which appeared as if it were no longer being used and which began at a field some distance from petitioner's house and did not run continuously to the still. In this connection it should also be pointed out that there were other houses in the vicinity both of petitioner's home and the still (R. 11-13).

2. Respondent, in its brief, concludes that petitioner was "approaching the still along the path from his home."

We have already shown that there was no path leading from petitioner's home. We further point out that there is absolutely no testimony in the record that petitioner was at any time on any path whatsoever. We have scrupulously examined the record on this point and can find no evidence that petitioner was on any path whatsoever; our conclusion from Burgess's testimony (R. 13) is that petitioner was merely walking through the woods.

3. Respondent's brief makes a point of the fact that "there was no suggestion that Brown or Grinnan showed surprise at petitioner's approach."

There is no evidence in the record whatsoever that either Brown or Grinnan saw or could have seen petitioner.

Law

Respondent in its brief tries to make capital of the fact that because in the Bozza case, *Bozza* v. *United States,* 320 U.S. 160 (1947), the conviction of Bozza was sustained upon a count of unlawfully carrying on the business of a distiller, similar to count two in the instant case, the Bozza case is not controlling in the instant case. We do not wish to labor the point, for we have argued the Bozza case at length in our brief supporting our petition, but we do want to point out that in the Bozza case there was clear, convincing, and uncontroverted evidence that Bozza had actually worked in and around the still, took instructions from the owner thereof and helped manufacture the alcohol. In fact this was assigned by the Supreme Court of the United States as the reason why the conviction on that count was sustained; the case holds that mere presence is not enough.

Respondent asserts in its brief that because two Courts have already passed upon the sufficiency of the evidence, there is no further cause for review, and cites on page 7 of its brief three cases to sustain this proposition. We point out that in the *Bozza* case, *supra*, the two lower courts had passed on the sufficiency of the evidence and yet the Supreme Court of the United States granted certiorari and passed upon the matter.

ALEX W. PARKER
EDWARD P. SIMPKINS, JR.
A. C. EPPS

Mutual Building
Richmond, Virginia

Counsel for Petitioner

September, 1950